Supreme Court, U.S.
FILED

961317 JAN 14 1997

OFFICE OF THE CLERK

No. _____

In The

Supreme Court Of The United States

October Term, 1996

GEORGE EDWARD JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

CORRECTED PETITION FOR WRIT OF CERTIORARI

SAMUEL W. CRUSE
Attorney for Petitioner
Post Office Box 212020
Augusta, Georgia 30917
(706) 650-3100

QUESTIONS PRESENTED FOR REVIEW

1. Did the Appellant Court err in sustaining Petitioner's conviction where the Petitioner was simultaneously convicted of the mutually exclusive charges of theft and embezzlement of the same items?

2. Did the Appellant Court err in upholding Petitioner's conviction for theft and embezzlement of the items involved based solely on Petitioner's mere presence near the scene of the alleged crime?

3. Did the Appellate Court err in admitting the originals and any replications of the money orders into evidence because such evidence was hearsay and the proper foundation to satisfy the business record exception of the Federal Rule of Evidence 803(6)?

4. Did the Appellant Court err in sustaining the Petitioner's conviction through finding that the Government has a jurisdictional interest in the Petitioner's possession of blank money orders?

PARTIES TO THE PROCEEDING

Petitioner, George Johnson, is a resident of Orlando, Florida. He was the Defendant in the lower court proceedings of this case and was the Appellant before the United States Court of Appeals for the Eleventh Circuit.

Respondent, United States of America, was the Plaintiff in the lower court proceedings and was the Appellee before the United States Court of Appeals for the Eleventh Circuit.

There are no other parties to this action.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceeding ii

Table of Contents iii

Table of Citations v

Opinions Below 1

Statement of Jurisdiction 1

Statutes Involved 1

Statement of the Case 1

Reasons for Granting the Writ 13

I. Certiorari should be granted to determine whether the Appellant court erred in sustaining the petitioner's simultaneous convictions for the mutually exclusive charges of theft and embezzlement of the same four money orders 13

II. Certiorari should be granted to determine whether the Appellate Court erred in upholding the Petitioner's conviction for theft and embezzlement of the items involved based solely on the

Petitioner's mere presence near the scene of the alleged crime 15

III. Certiorari should be granted to review whether the Appellant Court erred in admitting the original money orders, along with any replications of such money orders, into evidence because such evidence was hearsay and did not properly satisfy the business record exception of the Federal Rules of Evidence 803(6) 16

IV. Certiorari should be granted to determine whether the Appellate Court erred in sustaining the Petitioner's conviction through finding that the government has a jurisdictional interest in the Petitioner's possession of blank money orders 19

Conclusion 20

TABLE OF CITATIONS

CASES: Page

U.S. v. Blackwell,
694 F.2d 1325, 224 U.S. App. D.C. 350 (1982) 18

U.S. v. Blake,
488 F.2d 101 (11th Cir. 1973) 18

U.S. v. Fleetwood,
489 F.Supp. 129 (9th Cir. 1980) 19

U.S. v. Goichman,
547 F.2d 778 (3rd Cir. 1976) 18

U.S. v. Goslee,
389 F.Supp. 490 (1975) 17

U.S. v. Hall,
999 F.2d 1298 (8th Cir. 1993) 15

U.S. v. Hill,
835 F.2d 759 (10th Cir. 1987)14 14

U.S. v. Perlmuter,
693 F.2d 1290 (9th Cir. 1982) 18

U.S. v. Powell,
294 F.Supp, 1353, affirmed 413 F.2d 1037 (4th Cir. 1968) 14

U.S. v. Mendoza-Cecelia,
963 F.2d 1467 (11th Cir. 1992) 15,16

Moore v. United States,
160 U.S. 268, 16 S.CT. 294 (1895) 13

U.S. v. Smith,
742 F.2d 398 (8th Cir. 1984) 15, 16

STATUTES:

18 U.S.C. § 500 1

18 U.S.C. § 641 . . . . . 1, 19

OPINIONS BELOW

On October 17, 1996, the United States Court of Appeals for the Eleventh Circuit issued its Per Curiam opinion, affirming the Petitioner's conviction rendered in the United States District Court for the Middle District of Florida.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Eleventh Circuit and it's judgment of October 17, 1996. That judgment affirmed the conviction rendered in the United States District Court. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 500
18 U.S.C. § 641
(Pertinent text is set out in the appendix)

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW:

On January 5, 1995, Petitioner, George Edward Johnson, was indicted on Counts 1 through four for the theft of four United States Post Office money orders in violation of 18 U.S.C. § 500.

Respondent was also indicted on Counts 5 through 10 for the embezzlement of six United States Post Office money orders in violation of 18 U.S.C. § 641.

The ten indictments involved a total of six money orders. By virtue of the Respondent's indictments, the Petitioner was charged with both the theft and embezzlement of four of the same money orders.

On February 9, 1995, a jury found the Petitioner guilty on all 10 Counts of the indictment.

On April 24, 1995, the Honorable Patricia C. Fawsett issued a Judgment whereby the Petitioner was found guilty of all 10 counts of the Indictment after a plea of not guilty. Petitioner was ordered to pay a special assessment of $500.00 for counts 1 through 10 of the indictment, due immediately. Petitioner was further ordered to serve imprisonment starting May 26, 1995 in the Community Confinement Center for a period of seven months, placed on probation for a term of three years, provided that he serve seven months of community confinement under the least restrictive conditions as part of his probation, and he was ordered to pay restitution of $2,938.75 to the United States Postal Service, Disbursing Branch.

Petitioner properly exercised his right to appeal the convictions to the United States Court of Appeal for the Eleventh Circuit. The Court of Appeals for the Eleventh Circuit affirmed the conviction of the United States District Court for the Middle District of Florida on October 17, 1996, in a per curiam opinion.

The case was properly before the Court of Appeals under a jurisdictional grant of 28 U.S.C. § 1291.

Petitioner now seeks the review of this Court.

B. STATEMENT OF FACTS:

The Petitioner was indicted and tried for theft of four money orders and embezzlement of funds involved in those four and two other money orders. The Petitioner was a long time postal employee and had been a window clerk with the postal service for a number of years. At the time of the alleged events, he worked at College Park Station Post Office in Orlando, Florida. He later worked at Colonial Town Station Post Office in Orlando, Florida, up until the time of his removal from the Postal Service.

The first money order in question was money order #4263664499, in the amount of $700.00. This money order showed a purchaser of Steve Levai of Orlando, Florida and was made payable to the Internal Revenue Service in Doraville, Georgia. This money order was assigned to George Johnson, the Petitioner, in 1990. Steve Levai provided testimony that on May 13, 1991, he purchased the money order in question for $700.00 from the College Park Station Post Office in Orlando, Florida. (T-2-6, pp. 168, 169 & 172). The endorsement on the back of the money order shows that the Internal Revenue Service did receive the money and that the money was accepted by the Internal Revenue Service for an indebtedness that Mr. Levai had incurred with the Internal Revenue Service. The imprint date on the postal money order shows May 13, 1991, and Mr. Levai testified on three different occasions that he purchased the money order on May 13, 1991.

The Petitioner had been assigned the money order in question and, based upon a hand-written log book that was introduced as an exhibit at trial, the Petitioner sold the sequence of money orders 4263664490 through 4263664499 on October 12, 1990. That sequence of sales

in the log book was initialed, not by the Petitioner, but by another clerk with the Postal Service, verifying those figures and no discrepancy was brought to the attention of a supervisor. (T-2-3, p. 190). while the number "9" on the money order had been written over, there was no testimony or evidence to show that the Petitioner was in any way involved in writing the number "9" over the number "8" in the log book. (T-2-3, p. 230).

Evidence was presented by the Petitioner that showed that from May 13th through May 17th, the Petitioner was on annual leave and, therefore, could not have sold the money order to Mr. Levai on the date in question. (T-2-3, pp. 190-192 and exh. 24). The purpose of providing this information to the jury was to support Petitioner's contention that someone had taken the money order from him and he could not have sold it to the purchaser, Mr. Levai, on the date in question since Petitioner was on annual leave at that time. There was no contrary evidence presented by the government to show that the Petitioner was working on May 13 through May 17, 1991. In fact, all evidence pointed to the fact that the Petitioner was on leave during the time in question.

Petitioner was charged with embezzling the money in connection with the sale of this money order. The government alleged that the Postal Service had not received the funds for the sale of this first money order to Mr. Steve Levai. There was no evidence presented to show that the money order was sold on any date other than May 13, 1991, or any evidence to show that the Petitioner received the funds from such sale since he was not at the Post Office on May 12, 1991.

The government introduced a money order purchased by Mr. Levai on May 22, 1991. The purpose

of introducing this evidence was to support the government's accusation that Mr. Levai bought the $700.00 money order (exh. 5) on May 22, 1991. The endorsement on the $300.00 money order shows a processing or deposit date at Internal Revenue Service of May 26, 1991. (T-2-6, pp. 68-69). The $700.00 money order (exh. 5) shows a processing or deposit date at the Internal Revenue Service of three days later on May 21, 1991. (T-2-6, pp. 69-70).

The second money order in question, which the appellant is accused of not only stealing but embezzling, is money order #4505330464, dated August 5, 1991, in the amount of $600.00, showing a purchaser of Leslie Davila, payable to Maria Martinez. (exh. 1). This money order was assigned to Sandra Randolph, (T-2-3, p. 78) was imprinted on August 5, 1991, with an endorsement which shows that the money order was cashed on August 9, 1991, but was not reported missing by Sandra Randolph until August 10, 1991. The money order was scheduled to be sold on August 5, 1991. (T-2-3, pp. 77-78).

The allegation was that the "tick-mark" on the endorsement of the money order shows a letter similar to that used by the Petitioner as a matter of issue. The log book which was kept, showing transactions of Sandra Randolph, showed that particular money order was sold on August 5, 1991. According to the log book, which is initialed by another clerk within the College Park Post Office, Sandra Randolph sold money orders #463 through #467 on August 5, 1991. (Exh. 1-B). There was no indication that particular money order was in fact missing on August 5, 1991. In fact, according to the Clerk who verifies the money orders sold by clerks, it showed that this money order was sold by Sandra Randolph on August 5, 1991.

There was no evidence presented at trial that indicated that the Petitioner had access to the blank money order in question, money order #4505330464. Sandra Randolph testified that she saw initials of the Petitioner, while they were both window clerks with the Post Office. (T-2-3, pp. 90-92 & exh. 25). It must be pointed out to the Court that a letter of demand had been issued to Sandra Randolph for $600.00. (T-2-3, p. 214). Sandra Randolph could not testify as to when the money order was missing from her drawer. (T-2-3, pp. 208-209). There was no testimony offered as to when the money order could have been printed. (T-2-3, p. 212). Sandra Randolph was asked for handwriting samples but not for fingerprints. Inspector McGill was the Postal Inspector who investigated this issue. (T-2-8, p. 160). Inspector McGill also testified that there was a fingerprint on the back of the money order and that he did not ask for fingerprint cards from Sandra Randolph. (T-2-8, p. 160).

The issue concerning key envelopes and the manager's access to the drawer of Clerk Sandra Randolph was also raised. Earl Hammond was the manager at College Park Post Office. Mr. Hammond had mishandled the key envelope issue of Sandra Randolph. Mr. Hammond took the key envelope, which contained a spare key to Sandra Randolph's drawer, and opened the drawer outside of her presence. Sandra Randolph had not authorized Mr. Hammond to enter her drawer and did not have a witness present to protect her interests. (See, T-2-3, pp. 215-219). Barbara Carey testified that she routinely conducted a key exam between once and twelve times a year. (T-2-3, pp. 178-179). Ms. Carey then admitted that Mr. Hammond had in fact entered the drawer of Sandra Randolph. Barbara Carey admitted that she had been witness on the key envelope of Sandra Randolph. (T-2-6, p. 155). This is a violation of Postal

procedure and managers are not to be a witness to the key envelope. Ms. Carey also admitted that she had unsealed the key envelope of Sandra Randolph. (T-2-6, p. 156). Barbara Carey admitted that she and Earl Hammond have previously gone into Sandra Randolph's cash drawer. (T-2-8, pp. 154-158). The entire issue in that regard was to show that the Petitioner did not have sole possession or the opportunity for sole possession to enter Sandra Randolph's cash drawer.

The citizen/victim in this case, Ms. Davila, testified that she recognized her name and address but did not fill her name out herself. (T-2-6, pp. 117-119). However, Ms. Davila was questioned as to whether or not she provided fingerprints or handwriting when she was interviewed by Postal Inspector McGill. She testified that she had not given fingerprints or handwritings. (See, T-2-6, p. 126).

The third money order in question involved a money order #4505493476, dated September 16, 1991, in the amount of $600.00, showing a purchaser of Carlos Rodriguez and showing a payee of Jay Rodriguez in Porta Rico. According to the evidence this blank money order was assigned to Wiley Moore. The Government alleges that there is a "tick-mark" on the back of the endorsement on the money order in question that indicates that the Petitioner cashed the money order or processed that money order in a completed form.

Based upon the testimony this money order was not discovered on September 16, 1991. In fact, this money order was missing from Wiley Moore's money orders. According to documents introduced, there was a post-it note or some type of separate note showing that the money order was missing. However, the note indicated that the money order was missing on a date

other than the one in question. In fact, the amount of this money order was first discovered through a financial report of discrepancies of July 7, 1992. (T-2-3, p. 223). That discrepancy report showed not only the money order in question issued to Wiley Moore but also the one issued to Sandra Randolph.

There is no evidence whatsoever to show that the Petitioner in this case had access to the blank money order in question issued to Wiley Moore. There was no evidence to show that he had sole access to the cash drawer of Wiley Moore. Testimony revealed that Barry Murphy, another clerk at College Park Post Office who worked along side the Petitioner, Sandra Randolph, and Wiley Moore, had processed two $600.00 items on August 7, and August 12, which were the same amounts of the money orders in question that were taken from Sandra Randolph. (See, T-2-6, pp. 224-226).

Testimony revealed that the clerks, including Wiley Moore, were to keep money orders under lock and key. (T-2-3, p. 137). Testimony also revealed that Barbara Carey was the witness on Wiley Moore's key envelope which, as demonstrated above, was a violation of postal policy. (T-2-3, p. 219). The money order in question which was from Wiley Moore's drawer, was reported missing on September 18, 1991. (T-2-3, p. 219). Evidence was also presented that Barry Murphy, another clerk that worked with Wiley Moore and Sandra Randolph, processed items of $600.00 on October 3, 1991 and on October 8, 1991. (T-2-3, pp. 224-226). There was no evidence presented to show that the cash drawer of Wiley Moore had been pried open or forced open. (T-2-3, p. 220). There was no evidence that Wiley Moore did not in fact sell the money order in question. (T-2-6, p. 22).

As noted above, Barbara Carey was a witness on the key envelope of Wiley Moore and therefore had access to his cash drawer. (T-2-6, p. 23). It was confirmed that a supervisor was not to be a witness on a key envelope. (T-2-6, p. 124). Barbara Carey ceased being a witness on key envelopes after a grievance was filed against the U.S. Postal Service concerning that issue. (T-2-6, p. 24). Wiley Moore was issued a letter of demand in regard to the issue of the $600.00 money order.

Wiley Moore also testified that Barry Murphy would have been closer to his cash drawer as a window clerk than the Petitioner. (T-2-6, p. 119). Mr. Moore also testified that the clerk would not have been in reaching distance of his cash drawer if the clerk were situated next to Wiley Moore's cash drawer. (T-2-6, p. 116). Wiley Moore also testified that no handwriting exemplars or fingerprints were taken from him to eliminate him as a suspect in the case. (T-2-6, p. 125).

The next two money orders were money orders that were issued to Rick Pumfrey, one dated January 8, 1992, #4553407964, in the amount of $465.00. The second money order in question issued to Rick Pumfrey was dated March 15, 1991, #4553407965 also in the amount of $465.00. Both of these money orders were made payable to Jennie Kuhl. These two money orders were stored in the safe as of October 28, 1991, when they were made accountable to Barbara Carey, the supervisor at College Park Station Post Office. (T-2-3, p. 182). The two money orders were reported missing on November 20, 1991, approximately twenty two days after they were assigned to Barbara Carey. (T-2-6, p. 30). The documents that support the issuance of the two money orders in question to Barbara Carey show that on October 28, 1991, Barbara Carey signed for and received a quantity of

1,000 money orders. (T-2-6, pp.24-25). The two money orders in question were a part of that blank stock. (T-2-6, pp. 24-25).

There was no evidence whatsoever to show that the Petitioner had sole access or, in fact, had any access to the safe drawer where these blank money orders were kept. (T-2-8, p. 70). The testimony showed that Barbara Carey was the accountable paper custodian in that she kept up with the blank money orders. (T-2-3, pp. 181-182). There were seven window clerks at College Park Post Office which meant seven people could have gained access to the money orders in question. (T-2-3, p. 175). Again, there is no evidence whatsoever to show that the Petitioner had access to these blank money orders. According to the testimony of Barbara Carey, the supervisor, in regard to the two blank money orders in question which were issued to Rick Pumfrey, the money orders were kept locked in a drawer and she always kept the key on a key chain. Barbara Carey also testified that the drawer was never left unlocked and she admitted that she was responsible if the drawer was ever left unlocked. There was no evidence whatsoever that the drawer in question where to the money orders were kept was pried open. Rick Pumfrey, the person to whom the money orders were made out from, testified that he couldn't identify the clerk who waited on him and that no finger prints were ever taken from him nor handwriting samples taken from him. (T-2-5, p. 137).

The last money order in question is the money order allegedly purchased from Kim Floyd and made payable to Bill Wiley. This money order was brought in by postal inspector McGill's secretary who stated that the it had been found in the parking lot in blank form in the amount of One Hundred Five Dollars. (T-2-6, pp. 176-178). This money order was sold on February 1, 1993

and returned to the Petitioner on the same date.

According to the testimony, this money order was processed on February 10, 1993. Clerk Booker testified that the initials on Exhibit 6, which is the $105.00 money order did not look the same as the Petitioner's initials. (T-2-6, pp. 106-108). The secretary who had turned in the money order at the Post Office did not realize that there were two clerks that worked in the Post Office. (T-2-6, p. 180). The secretary also did not realize that there were two persons with a beard at Colonial Town, when she turned in the $105.00 money order. (See, T-2-6, p. 179). The secretary in attempting to identify the Petitioner at trial, stated that his hair looked a lot grayer in Court then when she had taken this money order in 1993. (See, T-2-6, p. 176). The secretary identification of this money order was flawed because she could not identify the Appellant.

Inspector McGill testified that the Appellant violated Postal policy by not turning the money order in. (See, T-2-7, pp. 25 & 26). However, a violation of Postal policy is not necessarily a violation of law. Inspector McGill testified that the Postal Service received $105.00 on February 1, 1993, when Postal Inspector McGill purchased the money order. (See, T-2-7, p. 26). If the Postal Service received the $105.00 on February 1, then it defies logic to assert that Petitioner embezzled that same $105.00 on February 10th, when it was alleged that he cashed the money order.

Defense Exhibit 8 was the actual money order cashed by Kim Floyd, the supposed victim whose name appeared on the $105.00 money order identified earlier as Government Exhibit 6. Ms. Floyd admitted that the endorsement on Government Exhibit 6, looked like her endorsement on Defense Exhibit 8. (See, T-2-7, p. 28).

The issue of entrapment was raised in that the money order that was brought into the Post Office in blank form in the amount of $105.00 had actually been paid for Postal Inspector McGill when he paid the Postal Service on February 1, 1993. The Petitioner was not being charged with embezzling money from Inspector McGill personally, but from the Postal Service. Since the Postal Service actually received funds, it is conceivable that Inspector McGill had in fact embezzled money from the Postal Service when it was alleged that the money order was processed on February 10th. Mr. Jamie Fret, a supervisor with the Postal Service, testified that if money orders are not secured according to the Postal Service rules and regulations, then the employee is accountable. (T-2-7, p. 143).

Additionally, Inspector Karsarsky was asked if he examined the fingerprints of the Petitioner as compared to all the money orders in question. Mr. Karsarsky stated that the request was made of him but no fingerprints were established that would identify the fingerprints of the Petitioner as being on any of the money orders in question. (See, T-2-7, p. 180).

The Clerk/client who testified in regard to general questions, testified that she knew of several incidents where managers had gone into the clerk's cash drawers without the clerks being present. (See, T-2-8, p. 83). Mr. Bob Borak, a manager of many years with the Postal Service, testified that it was not proper to have a manager that has accountability to have access to a clerk's keys, monies, or stamps. As was earlier noted, Barbara Carey and Earl Hammond both were witnesses to key envelopes and did, in fact, go into clerk's drawers without their knowledge. (See, T-2-8, pp. 115-117). Mr. Borak was also asked if it was proper Postal procedure for a window clerk to take their blank orders out of the

cash drawer and leave the money unsecured. He stated that it would have been improper for a clerk to do such. (See, T-2-8, p. 117). Mr. Borak also was asked if it was proper procedure for a Postal clerk to swap out stamps with a customer. (See, T-2-8, pp. 121-122). He stated that this was also a violation of Postal policy. (See, T-2-8, pp. 121-122). This issue was raised because of the previous testimony that Earl Hammond had asked Sandra Randolph, one of the clerks who alleged a money order was missing from her drawer, (see, exhibit 1) to in fact traded stamps with a customer under his supervision.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE APPELLANT COURT ERRED IN SUSTAINING THE PETITIONER'S SIMULTANEOUS CONVICTIONS FOR THE MUTUALLY EXCLUSIVE CHARGES OF THEFT AND EMBEZZLEMENT OF THE SAME FOUR MONEY ORDERS

It is readily apparent that the crimes of embezzlement and stealing are inconsistent because embezzlement presupposes lawful possession and theft does not. See Moore v. United States, 160 U.S. 268, 269-70, 16 S.CT. 294, 295 (1895). The crime of embezzlement requires that "the original taking of the property was lawful, or with the consent of the owner, and the crime of theft requires that the "felonious intent must have existed at the time of the taking." Id. Proof that a Defendant "converted" property of the Government is not proof that the Defendant "stole" it, because the concepts of stealing and conversion are mutually

exclusive, for purposes of a statute proscribing embezzlement, stealing, purloining, or knowing conversion of money or a thing of value of the United States. U.S. v. Hill, 835 F.2d 759 (10th Cir. 1987).

Embezzlement presupposes that the money or property came into the possession of the accused lawfully and/or with consent of owner, and that a fiduciary relationship exists between owner and accused. U.S. v. Powell, 294 F.Supp, 1353, affirmed 413 F.2d 1037 (4th Cir. 1968). Lawful possession is not created by "mere access" to an item. In this case, "mere access" was all that was proven at trial.

The Government could have simply followed a logical course and indicted the Petitioner on six counts of embezzlement. Instead, the Government became greedy and indicted the Petitioner on the mutually exclusive charges of theft and embezzlement. The Government offered the Petitioner a plea, however, after the Petitioner's rejection of the offerred plea, the Government moved to indict on the ten counts to induce settlement. However, in the zeal to pile on the charges, they failed to consider the mutually exclusive elements of the indictments.

To uphold these convictions against the Petitioner, requires the upholding of two incompatible verdicts. These two mutually exclusive verdicts essentially result in a finding on one hand that the Petitioner was in lawful possession of the money orders and a finding on the other hand that the Petitioner was in unlawful possession of those same money orders. This is obviously an unreasonable and illogical proposition. In fact, it would be impossible to have both lawful and unlawful possession of the same items at the same time. However, that is exactly what the Appellate Court's

affirmation of the lower court's decision requires.

Therefore, since it is logically inconsistent to convict an individual of both embezzlement and theft of the same items because the two offences require contradictory elements, the Appellant Court committed plain error and this Court should grant review in order to clarify this important federal issue that has not been, but should be, settled by this Court.

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE APPELLATE COURT ERRED IN UPHOLDING THE PETITIONER'S CONVICTION FOR THEFT AND EMBEZZLEMENT OF THE ITEMS INVOLVED BASED SOLELY ON THE PETITIONERS MERE PRESENCE NEAR THE SCENE OF THE ALLEGED CRIME

Mere presence at the scene of a crime is insufficient evidence to sustain a verdict of guilty. See U.S. v. Mendoza-Cecelia, 963 F.2d 1467 (11th Cir. 1992); U.S. v. Smith, 742 F.2d 398 (8th Cir. 1984). Additionally, physical proximity during the commission of a crime is insufficient to establish responsibility for the crime. U.S. v. Hall, 999 F.2d 1298 (8th Cir. 1993). In other words, the Government must do more than simply place the accused at or near the scene of a crime to properly establish guilt.

The Government was unable to offer any concrete evidence that the Petitioner stole or embezzled the money orders in question. The Government was only able to establish that the Petitioner was in the proximity of the money orders at some time. Petitioner's proximity to the money orders was no greater than that of any

number of other postal employees at this site. The Petitioner, like all other similarly situated postal employees at this location, was in the general area of the money orders in question. However, there were seven window clerks at the College Park Post Office. (T-2-3, p. 175). Therefore, at least seven people could have gained access to the money orders in question. The government's burden of proof is far greater than merely establishing such general presence. The Government must prove the elements of the crime. In this case, the Government clearly failed to met this burden.

As noted above, the mere fact that the Petitioner was in close proximity to the commission of the crime is insufficient to establish the issue of guilt and sustain such a verdict. See U.S. v. Mendoza-Cecelia, 963 F.2d 1467 (11th Cir. 1992); U.S. v. Smith, 742 F.2d 398 (8th Cir. 1984). Since there was no evidence to show that the Petitioner committed the crimes in questions other than his mere proximity to the crime scene, the Court of Appeals committed error in failing to reverse the conviction based upon the insufficiency of the evidence.

The Appellate Court's upholding of the conviction establishes a dangerous precedent that this Court should take the opportunity to review and correct. The Government's burden in such a case must be more than merely establishing presence at the scene of the crime. This issue presents an important question which is worthy of this court's review.

III.

CERTIORARI SHOULD BE GRANTED TO REVIEW WHETHER THE APPELLANT COURT ERRED IN ADMITTING THE ORIGINAL MONEY ORDERS, ALONG WITH ANY REPLICATIONS OF SUCH MONEY

ORDERS, INTO EVIDENCE BECAUSE SUCH EVIDENCE WAS HEARSAY AND DID NOT PROPERLY SATISFY THE BUSINESS RECORD EXCEPTION OF THE FEDERAL RULES OF EVIDENCE 803(6)

Evidence is admissible under the business records exception to the hearsay rule if the custodian of record or another qualified person establishes that the evidence was made by a person with knowledge at or near time of incident recorded, the evidence was made and kept in the course of a regularly conducted business activity, and it was the regular practice of the business activity to make the record. Fed.Rule Evid. 803(6).

Additionally, in order for government records to be admissible under the business records statute, the person identifying the records must testify as to the process by which the records were prepared. U.S. v. Goslee, 389 F.Supp. 490 (1975). Such testimony is required to guarantee the reliability of the records. Id.

At trial, the Government failed to offer the testimony of a record custodian or other qualified person who could properly lay the foundation for the admission of the money orders in question. The Government did not offer any witness who was able to testify as to whether the money orders were made by a person with knowledge at or near the time of the incident recorded in the record. This lack of proper foundation is in direct derogation of the Federal rules of evidence and is clear error.

Moreover, in the case of each money order that the Government offered into evidence, the Government was unable to offer a witness who had any knowledge of the process by which the particular money orders were prepared. Indeed, no witness was able to testify as to

whether they had ever seen the money orders in question at or near the time of their sale. Therefore, the guarantee of reliability of the money orders was not present.

Additionally, to permit admission of business records, testimony must be given by the custodian of the records that adequately authenticates the accuracy of the record and explains efforts employed to ensure such accuracy. U.S. v. Blake, 488 F.2d 101 (11th Cir. 1973). A document cannot be admitted without some proof of its authentication and, generally, contents themselves are not capable of providing this authentication unless they happen to reveal certain knowledge that could be true of only one individual. U.S. v. Goichman, 547 F.2d 778 (3rd Cir. 1976). As a general rule, tangible evidence must be properly identified or authenticated before admitted into evidence at trial. Fed.Rule Evid. 901(a); U.S. v. Blackwell, 694 F.2d 1325, 224 U.S. App.D.C. 350 (1982). Strict compliance with authenticity rules is required. U.S. v. Perlmuter, 693 F.2d 1290 (9th Cir. 1982).

Since the records custodian did not testify at trial, it was error to admit the money orders. Indeed, the Government was unable to offer any witness who could testify to the accuracy of the money orders or the methods employed to ensure their accuracy. The Judge allowed the money orders to be admitted in spite of this lack of foundation. Additionally, the Government's weak attempts to lay foundation for the money orders amounted to nothing more than mere unsupported speculation.

Therefore, the money orders and any exhibit relating to them should not have been admitted at trial, and the Appellant Court committed error in sustaining the lower court's rulings as to the admissibility of this evidence. This issue presents an important federal

question which implicates the proper application and parameters of the Federal Rule of Evidence 803(6). The Respondent failed to met the requirements of 803(6), and the Appellant Court erred in finding that such requirements were satisfied. As such, this court should grant review to clarify this important federal issue.

IV.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE APPELLATE COURT ERRED IN SUSTAINING THE PETITIONER'S CONVICTION THROUGH FINDING THAT THE GOVERNMENT HAS A JURISDICTIONAL INTEREST IN THE PETITIONER'S POSSESSION OF A BLANK MONEY ORDERS

Mere issuance of a paper by the government does not provide the necessary federal interest for jurisdiction under 18 U.S.C. § 641 which prohibits embezzling, stealing or receiving or concealing or retaining any stolen record, voucher, money or thing of value of the United States but, rather, what appears on paper must show loss of significance to government. U.S. v. Fleetwood, 489 F.Supp. 129 (9th Cir. 1980).

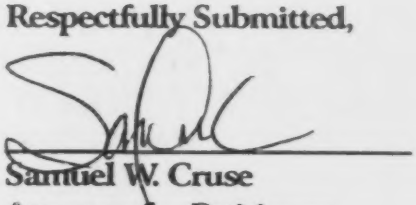
It is difficult to establish how the value of the money orders were determined at the time they were allegedly taken by the Petitioner. If the money orders were indeed taken in blank form, they did not have an established value. Indeed, while in blank form money orders have no established value. Until they are imprinted with a dollar amount and a Postal seal they are essentially valueless. Therefore the Petitioner did not steal any actual value from the government that was in excess of $100.00 as is required for a felony charge. See 18 U.S.C. § 641.

Therefore, the Appellant Court committed error in regard to this issue and this Court should grant review of this important question of law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals

Respectfully Submitted,



Samuel W. Cruse
Attorney for Petitioner
Post Office Box 212020
Augusta, Georgia 30917
(706) 650-3100

Appendix - A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.95-2572

D.C. Docket No. 94-117-CR-ORL-19

UNITED STATE OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE EDWARD JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(October 17, 1996)

Before BIRCH, BLACK and CARNES, Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.[1]

---

[1]11th Cir. R. 36-1 provides:
When the court determines that any of the following circumstances exist:

(a) the judgement of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) a summary judgement, directed verdict, or

judgement on the Pleadings is supported by the record;

(e) the judgement has been entered without a reversible error of law; and an opinion would have no precedential value, the judgement or order may be affirmed or enforced without opinion.

Judgement entered: October 17, 1996

For the Court: Miguel J. Cortez, Clerk

By:_____
Deputy Clerk

Appendix - B

18 U.S.C. § 641. Public money, property, or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys, or disposes of any record, voucher, money, or thing or value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted-

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

Appendix - C

18 U.S.C. § 500. Money Orders

Whoever, with intent to defraud, falsely makes, forges, counterfeits, engraves, or prints any order in imitation of or purporting to be a blank money order or a money order issued by or under the direction of the Post Office Department or Postal Service; or

Whoever forges or counterfeits the signature or initials of any person authorized to issue money orders upon or to any money order, postal note, or blank therefor provided or issued by or under the direction of the Post Office Department or Postal Service, or post office department or corporation of any foreign country, and payable in the United States, or any material signature or indorsement thereon, or any material signature to any receipt or certificate of identification thereof; or

Whoever falsely alters, in any material respect, any such money order or postal note; or

Whoever, with intent to defraud, passes, utters or publishes or attempts to pass, utter or publish any such forged or altered money order or postal note, knowing any material initials, signature, stamp impression or indorsement thereon to be false, forged, or counterfeited, or any material alteration therein to have been falsely made; or

Whoever issues any money order or postal note without having previously received or paid the full amount of money payable therefor, with the purpose of fraudulently obtaining or receiving, or fraudulently enabling any other person, either directly or indirectly, to obtain or receive from the United States or Postal Service, or any officer, employee, or agent thereof, any sum of

money whatever; or

Whoever embezzles, steals, or knowingly converts to his own use or to the use of another, or without authority converts or disposes of any blank money order form provided by or under the authority of the Post Office Department or Postal Service; or

Whoever receives or possesses any such money order form with the intent to convert it to his own use or gain or use or gain of another knowing it to have been embezzled, stolen or converted; or

Whoever, with intent to defraud the United States, the Postal Service, or any person, transmits, presents, or causes to be transmitted or presented, any money order or postal note knowing the same-

(1) to contain any forged or counterfeited signature, initials, or any stamped impression, or

(2) to contain any material alteration therein unlawfully made, or

(3) to have been unlawfully issued without previous payment of the amount required to be paid upon such issue, or

(4) to have been stamped without lawful authority; or

Whoever steals, or without intent to defraud or without being lawfully authorized by the Post Office Department or Postal Service, receives, possesses, disposes of or attempts to dispose of any postal money order machine or any stamp, tool, or instrument specifically designed to be used in preparing or filling out the blanks on postal money order forms-

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.